

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

VICKI LINNEMAN, <i>et al.</i> ,	:	Case No. 1:15-cv-748
	:	
Plaintiffs,	:	(Judge Susan J. Dlott)
	:	(Magistrate Judge Stephanie K. Bowman)
vs.	:	
	:	
VITA-MIX CORPORATION, <i>et al.</i> ,	:	<u>PUTATIVE CLASS ACTION</u>
	:	
Defendants.	:	
	:	

**DEFENDANTS' MOTION FOR LEAVE TO FILE *INSTANTER*  
SURREPLY IN FURTHER OPPOSITION TO  
CLASS COUNSEL'S MOTION FOR ATTORNEYS' FEES**

Pursuant to Local Rule 7.2(a)(2), Defendants Vita-Mix Corporation, Vita-Mix Management Corporation, and Vita-Mix Manufacturing Corporation (collectively, "Vita-Mix" or "Defendants") respectfully request the Court for leave to file *instante* the attached surreply in further opposition to Class Counsel's Motion For Attorneys' Fees (Doc. 42, Fee Petition). Pursuant to Local Rule 7.3(b), Defendants conferred with Class Counsel, who advised that they are not able to agree the filing of this surreply at this time. A surreply is warranted because Class Counsel have raised new arguments and present new evidence for the first time in their reply (Doc. 87, Reply), to which Vita-Mix has not had the opportunity to respond.

Further, in the interest of good faith negotiation, Vita-Mix withheld moving for leave to file its surreply until the most recent mediation efforts between Vita-Mix and Class Counsel reached impasse on Friday, June 8. While the efforts remained ongoing, Defendants wanted to direct their efforts to mediation and not engage in further litigation that might not advance those efforts. Therefore, Vita-Mix now addresses the new arguments raised in Class Counsel's reply for the Court's consideration in connection with determining a reasonable and fair fee award. A

copy of Vita-Mix's surreply is attached as Exhibit A to this motion. A proposed order is attached for the Court's convenience.

Respectfully submitted,

/s/ Carolyn A. Taggart

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*Counsel for Defendants*

### **MEMORANDUM IN SUPPORT**

Vita-Mix respectfully requests leave to file *instantly* its Surreply Opposing Class Counsel’s Motion For Attorney Fees (“Surreply”). This Court requires a party to demonstrate “good cause” to file a surreply. Loc.R. 7.2(a)(2). “This Court has routinely found good cause exists to permit a party to file a surreply to address an issue raised for the first time in a reply brief.” *Cornell v. World Wide Bus. Servs. Corp.*, No. 2:14-cv-27, 2015 U.S. Dist. LEXIS 148191, at \*15 (S.D. Ohio Nov. 2, 2015) (citing *Thompson v. Transam Trucking, Inc.*, 750 F. Supp. 2d 871, 884 (S.D. Ohio 2010)); *Levy v. Cain, Watters & Assocs., P.L.L.C.*, No. 2:09-cv-723, 2010 U.S. Dist. LEXIS 9537, at \*2 (S.D. Ohio Jan 15, 2010). This is so because surreplies prevent a non-moving party from facing prejudice where it would not otherwise have the opportunity to respond to arguments first raised in a reply brief. *See GE Commercial Distrib. Fin. Corp. v. W.W. Cycles, Inc.*, No. 4:10CV2673, 2011 U.S. Dist. LEXIS 51005, at \*9 n.4 (N.D. Ohio May 12, 2011) (“To avoid this prejudice a district court may allow the non-moving party a fair opportunity to respond by way of a surreply.”).

Class Counsel raise several issues for the first time in their reply in support of their fee petition and present new evidence as well.<sup>1</sup> For example, Class Counsel raises an argument for the first time that the determination of reasonable fees should be determined by state law, not federal law. (Doc. 87, Reply, PageID #3550–52, at pp.6–8.) In contrast, in their fee petition, Class Counsel argued that federal law controls the award of reasonable attorney fees. (*See, e.g.*, Doc. 42, Brief, PageID #795, at p. 7.) Also, Class Counsel provide new a declaration and evidence. (Doc. 87-3, Declaration, PageID #3626; Doc. 90-1, Time Entries, PageID #3752–

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<sup>1</sup> Vita-Mix notes that although Class Counsel filed its Reply brief (Doc. 87) on April 10, Vita-Mix has withheld filing its surreply in their interest of participating in the ongoing mediation and settlement efforts related to the award of attorneys’ fees. The parties reached impasse in those negotiations on June 8, 2018.

3807, at pp. 1–56.) In part, Class Counsel use this new evidence to make a new “comparative” argument, reasoning that Class Counsel’s time should be considered reasonable in relationship to the hours Defendants’ counsel worked on this matter. (Doc. 87, Reply, PageID #3554, at p. 10 n.10.) But Class Counsel cherry pick the information from the documents that Vita-Mix provided in discovery and distort the analysis to make their hours appear reasonable (they are not). The attached surreply will provide the Court with a more complete picture, not just one side, to evaluate this evidence.

Defendants submit that this brief overview demonstrates that good cause supports the filing of Vita-Mix’s surreply because Class Counsel raised new issues and arguments in reply and presented new evidence to which Vita-Mix should have a fair opportunity to respond. For all these reasons, and for good cause shown, Vita-Mix respectfully requests this Court grant leave to file *instantly* the attached surreply.

Respectfully submitted,

/s/ Carolyn A. Taggart

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*Counsel for Defendants*

**CERTIFICATE OF SERVICE**

I hereby certify that on June 17, 2018 I electronically filed the foregoing with the Clerk of the United States District Court using the CM/ECF system, which will send notification of such filing to all attorneys of record.

Carolyn A. Taggart  
Counsel for Defendants